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ABSTRACT

As a basis for arriving at appropriate desegregation legal theory and policies, the case law in higher education, analogous case law from elementary and secondary education, and additional insights provided by social science, experience, and common sense are examined. The following issues are reviewed: (1) whether the desegregation of higher education requires the elimination of one-race institutions; (2) what must be done to ensure that students have genuinely free choice, and the institutional characteristics that affect choice; and (3) how much desegregation is required of black colleges. Drawing on court opinions, it is argued that the law requires a state to prove that any substantial racial disproportion in its enrollment results from genuinely free, voluntary decisions by students. Vestiges of the dual system that often serve as institutional barriers to free choice and that impede dismantling the racially dual system are addressed. Barriers include a century of underfunding of black colleges, resulting in inadequate programs and facilities; disproportionately one-race student bodies and faculties that racially identify institutions; a social atmosphere at white colleges that may be inhospitable to black students; counseling of black students into community colleges and black colleges; and testing and poor remedial education programs at white colleges that deter black students from completing their college education. It is suggested that private decisions, institutional behavior, and governmental acts interact and affect desegregation in a complicated way. (Author/SW)

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# DESEGREGATION WITHIN INSTITUTIONS OF HIGHER EDUCATION: WHAT REMEDIES DOES THE LAW REQUIRE?

by

Mary von Euler*

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Desegregation Within Institutions of Higher Education: What Remedies Does the Law Require? by Mary von Euler

## ABSTRACT

Although desegregation plans have been adopted in a dozen states which previously had segregated public systems of public higher education, it is not clear how much desegregation the law requires and what a desegregated system of higher education should look like. Drawing upon court opinions in elementary and secondary and higher education cases, the paper argues that the law requires a state to prove that any substantial racial disproportion in its enrollment results from genuinely free, voluntary decisions by students. It points to vestiges of the dual system that often serve as institutional barriers to free choice, and thus impede dismantling the racially dual system. Barriers include a centry of under funding of black colleges, resulting in inadequate programs and facilities, disproprotionately one-race student bodies and faculties which racially identify institutions, a social atmosphere at white colleges that may be inhospitable to black students, counseling of black students into community colleges and black colleges, and testing and poor remedial education programs at white colleges that deter black students from completing their college education.

## Desegregation Within Institutions of Higher Education: What Remedies Does The Law Require?

by Mary von Euler*

Now that all of the states that had segregated their systems of public higher education by statute have finally been found liable, or agreed to desegregate, we still are unsure how much desegregation is required. The basic prescription to remedy segregation is the elimination of the current effects of prior discrimination. 1/ In the case of elementary and secondary education, former dual school systems bear the burden to justify substantial racial disproportion in any school. While courts have ruled that institutions of higher education also have an affirmative duty to eliminate vestiges of a dual education system 2/, it is not entirely clear what those vestiges are and whether racial imbalance signals the existence of vestiges. In an attempt to shed light on this issue, as a basis for arriving at appropriate desegregation legal theory and policies, this paper will examine the case law in the area of higher education, analogous case law from elementary and secondary education, and additional insights provided by social science, experience and common sense. It will review three sets of issues:

I. Defining desegregation. Does the desegregation of higher education require the elimination of virtually one-race institutions, "racially identifiable" institutions, or something else?

II. Freedom of Choice. A critical distinction between elementary and secondary schools and institutions of higher education is said to be that attendance at the latter results from voluntary free choice. Because the desegregation mandate at both levels is equally exacting and the same, that desegregation remedies must work, 3/ choice must at the very least be genuinely free, not

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1/ Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971); Keyes v. School District No. 1, 413 U.S. 189 (1973); Columbus Board of Education v. Penick, 443 U.S. 449 (1979).

2/ Geier v. University of Tennessee, 597 F. 2d 1056 (6th Cir. 1979), cert. denied, 444 U.S. 886 (1979); Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va. 1971), aff'd per curiam sub nom. Bd. of Visitors of the College of William and Mary in Virginia, 404 U.S. 907 (1971).

3/ Green v. New Kent County Board of Education, 391 U.S. 430, 439 (1968); Geier v. Dunn, 337 F. Supp. 573, 579 (M.D. Tenn. 1972).

distorted by vestiges of segregation. What must be done to ensure that the choice is indeed free? What institutional characteristics affect choice?

III. Desegregation of black colleges. Because a characteristic of segregated higher education was not only the separation of the races but the neglect of black education and black institutions, what remedies are required? 4/ Can there be predominantly black colleges in a desegregated system? Conversely, may a state abolish its black colleges in carrying out its duty to desegregate?

I. Defining Desegregation.

Beyond the issue of whether one-race schools or racially identifiable institutions are compatible with a "desegregated" system, how is a desegregated institution defined? Must a desegregated institution reflect the racial proportions of its service area or applicant pool (in elementary and secondary education, the school district, in higher education, often the entire state)? Or does desegregation require that a school be less than half minority? To what extent must a definition be independent of the demographics of a particular state, service area or district? How have courts, policy-makers and social scientists approached these concepts?

In elementary and secondary education cases after Swann, most courts have defined desegregation by requiring the district to justify substantial deviation in any schools, grade levels or classrooms from the district's racial composition. 5/ Some experts have felt that the application

4/ See, e.g., Bell, Black Colleges and the Desegregation Dilemma, 28 Emory Law Journal 899 (Fall 1979).

5/ Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). District courts have variously applied the Swann standard. The plan for Charlotte approved by the Supreme Court required the assignment of students so that the racial proportion of students at each grade level in each school would reflect proportions throughout the district. 311 F. Supp. 265, 268 (W.D.N.C. 1970). A new plan, recently accepted, is based on the principle that no school should be majority minority. Unpublished opinion, on remand from 626 F. 2d 1165 (4th Cir. 1980), cert. denied, 101 S.Ct. 1758 (1981). (continued)

5/ (Continued)

In Buffalo, a school district with a racial composition 50% black, 50% white, Chief Judge John T. Curtin defined a desegregated school as one from 25-65% minority. Arthur v. Nyquist, 473 F. Supp. 830, 845 (W.D.N.Y. 1979), remanded on grounds that the plan he accepted may not have met this standard, 636 F. 2d 905 (2d Cir. 1981). In a Georgia district with similar racial composition, the court set guidelines of plus or minus 25% of the district's racial proportions. Anderson v. Dougherty County Board of Education, 609 F. 2d 225, 227 (5th Cir. 1980). This standard has been adopted by statute in Connecticut, 18 Integrateducation Nos. 103-106, p.145. In the Sixth Circuit, the standard appears to be plus or minus 15%, regardless of a district's racial composition. In Dayton, Ohio, a district with a composition 48% black, the court required schools to be within that range, or 33-63% black. Brinkman v. Gilligan, 539 F. 2d 1084 (6th Cir. 1976). The same guidelines were applied in Cleveland, a district with only 35% white enrollment. Reed v. Rhodes, 472 F. Supp. 615 (N.D. Ohio 1979).

In Denver, Judge Richard P. Matsch applied the same standard (plus or minus 15%) to a triethnic district, requiring all schools to be 43% Anglo, 57% minority (Hispanic and black). Thus all schools must be 28-58% Anglo. Keyes v. School District No. 1, 474 F. Supp. 1265, 1272 (D. Colo. 1979). In a similarly triethnic district, a court in California requires the racial composition of each school to approximate the districtwide percentage of each group. Unreported order of July 21, 1971, following a more general order to the district to produce a plan for racially balanced schools, Soria v. Oxnard Independent School District, 328 F. Supp. 155 (C.D. Cal. 1971).

In Oklahoma City, with a districtwide school enrollment that is 23% black, Chief Judge Luther Behanon first stated that no particular ratios were required, and then set 20% black as a starting point, permitting deviation in deference to practical considerations, 338 F. Supp. 1256, 1269 (W.D. Okla 1972), aff'd 465 F. 2d 1012 (10th Cir. 1972).

Schools in Minneapolis must now meet the court's current guideline that no school shall be more than 46% combined minority or 39% of any one minority. Booker v. Special School District #1, 451 F. Supp. 659 (D.Minn. 1978), aff'd, 585 F. 2d 347 (8th Cir. 1978), cert. denied, 443 U.S. 915 (1979).

The Pennsylvania Human Relations Commission applies a similar standard (plus or minus 15%) under state law, as discussed in 18 Integrateducation Nos. 103-106, p.158.

A district court in East Baton Rouge declined to set ratios but implied that an 80% one-race school would be regarded with suspicion. Davis v. East Baton Rouge Parish School Board, 498 F. Supp. 580, 584 (M.D. La. 1980), on remand from 570 F. 2d 1260 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979).

of this definition to cities of varying demographics led to bizarre contradictions. 6/ If schools are to reflect a state's or a district's racial composition, a school that is 90% black in Atlanta or Detroit might be desegregated, while a school in those cities that is balanced 50-50 would be segregated. The exact opposite might hold for Birmingham, Alabama. In states and communities with populations that are less than a fifth black, a 50% black school is segregated but a 10% black school is not. To some observers these differences are absurd; to others they are logical. This approach is nevertheless applied often to higher education, such that segregation is defined as the extent to which the racial composition of an institution deviates from random distribution throughout the system.7/

A second common, but legally shaky, definition of "desegregation" is for no school to have a majority of minority students. This concept has been adopted in the Emergency School Aid Act. 8/ The Massachusetts Racial Imbalance Law 9/ and by a few courts. 10/ It avoids some results that seem contradictory, and it is easy to apply.

Civil rights advocates have recently challenged the concepts of "racial balance" and "no majority minority." Most often the objection is raised in predominantly minority cities where courts have left many all-minority schools segregated, purporting that there are too few whites to go around. Thomas I. Atkins, General Counsel of the NAACP, attacked a plan proposed for St. Louis that would place one-third of black

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6/ Orfield, Must We Bus? The Brookings Institution, 1978, pp.63 et seq., 177-80. The author quotes New York's Chancellor Irving Anker on the subject, p.177. The absurdity arises from the Supreme Court's Milliken v. Bradley decision, 418 U.S. 717 (1974), making it difficult to desegregate entire metropolition areas.

7/ Thomas G.E., J.M. McPartland and D.C. Gottfredson, "Desegregation and Black Student Higher Educational Access," in G.E. Thomas, ed., Black Students in Higher Education, 1981 (hereinafter cited as Black Students), p. 336.

8/ 20 U.S.C. §3207(7).

9/ c.641, St. 1965, M.G.L., c.15, Sec.11.

10/ In Clark County-Las Vegas, the court of appeals approved a plan requiring all but remedial elementary school classes to be less than 50% black. Kelly v. Guinn, 455 F. 2d 100, 109 (9th Cir. 1972). A similar viewpoint underlies a new plan adopted in Charlotte, North Carolina, on remand from the Fourth Circuit, Martin v. Charlotte-Mecklenburg Board of Education, 626 F. 2d 1165 (4th Cir. 1980). Possibly the courts are roughly applying the "substantial disproportion" standard to districts in which 50% white is demographically appropriate.

children and all white children in integrated schools, defined as white majority, saying,

> "Any notion that whites can't take blacks in more than a 50 percent dose is constitutionally unacceptable. Our children will not be sacrificed to the political or other desires that produced this plan. 11/

Judge Thomas A. Wiseman, Jr., recently expressed similar views in explaining a new plan for Nashville-Davidson County, Tennessee. He accepted the plaintiffs' notion that requiring every school to reflect the district's racial proportions was based on an "invidious racist" assumption that a quality education requires a white majority. (The plaintiffs had especially objected to a plan that relied on the busing of black, but not white, children in grades 1-4.) After hearing the plaintiffs' arguments and the testimony of social scientists, the judge chose a standard that no middle school should consist of less than 15% of any race saying,

> "The selection of 15 percent is arbitrary....Preparation of students to live in a pluralistic society makes a biracial, intercultural experience highly desirable. However, it was not the intent of Brown and its progeny to require blacks always to be in the minority; nor should these precedents have been read to require assimilation. A rigid adherence to racial ratios premised on the social goal of assimilation, which in the process demeans, diminishes, or benignly neglects cultural and ethnic pride as well as differences, is not only constitutionally unrequired, but socially undesirable." 12/

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11/ Quoted in 18 Integrateducation Nos. 103-106, p.154. Issues related to racial mix are discussed well in Brunson v. Board of Trustees of School District No. 1 of Clarendon County, South Carolina. Judge Sobeloff, in a concurring opinion, strongly opposed any implication of judicial approval of Dr. Thomas Pettigrew's conclusion based on social psychological evidence, that good schools are those in which high socio-economic status or white children predominate. 429 F.2d 820 (4th Cir. 1970).

12/ Kelley v. Nashville Metro Cty. Board of Education, 492 F. Supp. 167, 193 (M.D. Tenn. 1980). A former plan had required 15-35 percent black enrollment in all inner city schools, which the court noted had caused white flight to outer suburbs that were within the metropolitan school district but had been exempt from the requirement. 479 F. Supp. 120, 122 (M.D. Tenn 1979). See also, Flannery, J.H., De Jure Desegregation: The Quest for Adequacy, 4 Journal of Law and Education 141 (Jan. 1975).

This third approach seems to define a desegregated institution as one having a significant other-race presence.

A fourth definition of desegregation, which can be combined with any of the other three, follows the Supreme Court's holding in Milliken v. Bradley II 13/ that desegregation may require a broad array of educational components, in addition to racial ratios, in order to remedy the effect of prior discrimination. This may be termed a "numbers plus education" definition. District courts in five circuits have followed the Supreme Court's lead, in such cities as Cleveland 14/ Wilmington 15/, St. Louis 16/, Indianapolis 17/, Nashville 18/ and Denver, 19/ ordering compensatory education, in-service teacher training, unbiased testing, counseling and disciplinary procedures, and multicultural curricula. Desegregated faculty has consistently been regarded as an essential component of a desegregated school.

13/ 433 U.S. 267 (1977).

14/ Reed v. Rhodes, 455 F. Supp. 569 (N.D. Ohio 1978), aff'd, 607 F. 2d 714 (6th Cir. 1979), cert. denied, 445 U.S. 935 (1980).

15/ Evans v. Buchanan, 447 F. Supp. 982 (D. Del. 1978), aff'd, 582 F. 2d 750 (3d Cir. 1978), cert. denied sub nom. Delaware State Board of Education v. Evans, 100 S. Ct. 1862 (1980).

16/ Liddell v. Board of Education of the City of St. Louis, 491 F. Supp. 351 (D.C. Mo. 1980), on remand from the 8th Circuit.

17/ U.S. v. Board of School Commissioners, Indianapolis, 637 F. 2d 1101 (7th Cir. 1980), cert. denied, 101 S. Ct. 114 (1980), affirming the grant of ancillary relief in 506 F. Supp. 657 (S.D. Ind. 1979).

18/ Kelley v. Metropolitan Cty. Board of Education, 492 F. Supp. 167, 196-7 (M.D. Tenn. 1980). While not desegregating grades K-4, the judge ordered significantly smaller classes in primary schools with low acheivers.

19/ Keyes v. School District #1, 474 F. Supp. 1265 (D. Colo. 1979). The judge stated that it is impossible to define desegregation and a non-racial school system, but it is more than ratios, and includes consideration of faculty, curricula, athletic programs and physical plant, 474 F. Supp. at 1269.

In the case of higher education, Geier suggests that desegregation requires "racial balance," but the term is left undefined. 20/ A more appropriate, though equally vague, term may be a "substantial racial mixture." 21/

A Consent Decree, recently accepted by opposing parties and approved by a court for the University of North Carolina 22/, seems to have adopted a "substantial other race presence" standard that establishes a goal for traditionally black institutions of 15% white enrollment but for traditionally white institutions of 10.6% black enrollment, with no clue as to why more whites than blacks are needed to desegregate. Although consent decrees carry no precedential weight in courts, this decree is nevertheless of interest as an indication of Education Department policy in 1981.

II. Freedom of Choice.

We know that free choice distinguishes higher education from elementary and secondary education, but we do not know how students choose where to go to college. There is little empirical research on the subject. Courts have said that a desegregation plan is judged by whether it works. Insofar as factors influencing choice serve as barriers to carrying out the affirmative duty to dismantle a dual system of higher education, they must be removed. The issue cannot be avoided for lack of data (although research could help in the development of effective remedies).

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20/ Geier v. Dunn, 337 F. Supp. 573 (M.D. Tenn. 1972).

21/ The term is used in David E. Kendall, The Affirmative Duty to Integrate in Higher Education, 79 Yale Law Journal 666 (March 1970) at 683 (hereinafter cited as Kendall). This Note is one of the few law review articles that is cited in the sparse case law on higher education desegregation.

22/ State of North Carolina v. Department of Education No. 79-217 CIV-5 (E.D. N.C. July 13, 1981) p.21.

The principle that a desegregation plan is judged by whether it desegregates in fact was first enunciated in Green v. New Kent County. 23/ It was applied to higher education when the Federal court in Tennessee stated that a desegregation plan "must necessarily depend . . . on whether it makes the [black] institution attractive to students who will exercise a free choice as to where to attend college." 24/ Characteristics of both traditionally white and traditionally black colleges may influence choice.

a. Program and facilities. Black students' segregated elementary and secondary education often ill-prepares them for aspects of higher education, 25/ so remedial services are needed to undo the effects of this prior discrimination. However, compensatory educational services are often offered only at traditionally black colleges. By not offering compensatory education and appropriate counseling services, the traditionally white colleges are in effect sending a signal that blacks are unwanted. 26/ The Nashville court recognized the need for compensatory education, financial aid, and counseling to increase the retention of black students at traditionally white institutions. 27/

23/ 391 U.S. 430 (1968).

24/ Sanders v. Ellington, 288 F. Supp. 937, 943 (M.D. Tenn. 1968). Ways to ensure that choices are free are discussed by Kendall, supra.

25/ Sanders v. Ellington, 288 F. Supp. at 940-41.

26/ Institutional changes that are needed at traditionally white colleges are discussed by Gail Thomas in "The Future of Blacks in Higher Education," the concluding chapter of her book, Black Students, pp 384-85.

27/ Richardson v. Blanton, 597 F. 2d 1978, 1984 (6th Cir. 1979). For one author's assessment of subtle ways in which racial messages are conveyed, see Paula E. Brown, "Institutional Racism in the City College System in Chicago," 18 Integrateducation Nos. 103-106, page 116. The author discusses a reference book's and college catalogues' treatment of such subjects as program offerings, costs, entrance requirements and procedures.

Black colleges suffer from a public image that they are "inferior," 28/ partly arising from racist notions, partly as a result of catering to less prepared students who may demand fewer advanced programs, but primarily because historically the government has underfunded educational programs, research and services at black colleges. 29/ Moreover, governmental discrimination came on top of scarce dollars from other sources, such as endowments and alumni. 30/ The outcome of these past discriminatory policies is a public image that will not be reshaped until all programs and resources (not just current funds) are equal. Measures may be needed to enhance program offerings at the traditionally black institutions and to educate the public about those new programs . 31/

b. A significant other-race presence is necessary to free choice. Chief Judge Frank Gray, Jr., who orchestrated desegregation of elementary, secondary and higher education in Nashville from 1972 to 1978, noted the necessity for a visible white presence at a traditionally black college in order to attract whites in substantial numbers. 32/ In 1977 he concluded that for Tennessee a range of black students at white colleges from .8% to 10.2%, while a black college remained 99% black, was not enough, although 9.7% black enrollment at traditionally white institutions as a whole was satisfactory. He declined to order specific percentages or offer

28/ Hunnicutt v. Burge, 356 F. Supp. 1227 (M.D. Ga. 1973).

29/ Trueheart, W.E. The Consequences of Federal and State Resource Allocations on Development Policies for Traditionally Black Land-Grant Institutions, 1862-1954. Harvard Graduate School of Education dissertation, 1979; Carnegie Commission on Higher Education, From Isolation to Mainstream: Problems of the Colleges Founded for Negroes (1971).

30/ See Kendall at 688.

31/ Geier v. Dunn, 377 F. Supp. 573 (M.D. Tenn. 1972).

32/ 337 F. Supp. at 581.

further guidance. 33/ However, he found it appropriate to look behind an institution's total enrollment to the racial composition of enrollment at separate campuses. He deemed a traditionally black institution still segregated where one campus was 12% white, while others were 80% white.

Social scientists use the term "critical mass" to describe the minimum percentage of any race that should be present to make desegregation possible, and to avoid stereotyping and isolationism. 34/ However, there is little empirical research on what percentage constitutes a critical mass. It has variously been set at 10%, 20% and 30%. Research on housing indicates that most families of minority groups prefer to live in desegregated environments, but do not like being the lonely first minority family on the block. Similarly, most whites are not opposed to integration, but do not like being in a small minority. 35/

Other research on race relations indicates that very small numbers of any group fosters stereotyping because it is impossible to experience the diversity that exists within any group, and

33/ Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977).

34/ Charles v. Willie, Racial Balance or Quality Education, 84 School Review 313 (1976). Social Scientists Eubanks and Levine, in a recent study that attempts to discover what makes for successful magnet schools assumed that some proportion or number of non-minority students was critical but declined to guess what it might be. Daniel U. Levine and Eugene F. Eubanks, "Attracting Nonminority Students to Magnet Schools in Minority Neighborhoods," 18 Integrateducation Nos. 103-106, page 52 (1981).

35/ Reynolds Farley et al., Barriers to the Racial Integration of Neighborhoods, 441 Annals 97 (1979). D. Taylor et al., Toward Racial Integration, 238 Scientific American 42 (1978).

isolationism, the singling out of members of a minority group for abnormal treatment (favorable or adverse). 36/ Recent research on black students at white colleges indicates that where black students are present in small numbers they become alienated and do not perform well academically. 37/

Numbers are particularly critical to determining whether the establishment of a competing white institution has served as an impediment to the desegregation of a traditionally black institution. 38/ To achieve the necessary numbers, institutions need to use biracial teams to recruit (recording which high schools they visit), and distribute nondiscriminatory catalogues. 39/ Other measures may also be useful.

c. Faculty quality and diversity. Courts have consistently held that to desegregate an educational institution, faculty as well as students must be desegregated. 40/ The principle that faculty and administration must be desegregated, and employment of black faculty at traditionally white institutions must be increased, was applied to higher education in Geier. 41/ Courts point out that when the racial composition of faculty and students is the same, the public sees the institution

36/ Robert Crain and Thomas Pettigrew discussed these issues in separate reports to Judge Paul Egly in connection with Crawford v. Board of Education of the City of Los Angeles, Case No. 822-854, Los Angeles County Superior Court, November 14, 1978.

37/ Allen, W.R., "Correlates of Black Student Adjustment, Achievement, and Aspirations at a Predominantly White Southern University," in Black Students, p.129.

38/ See section f, infra, for a discussion of this issue in Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 and Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977).

39/ See Kendall at 690.

40/ Rogers v. Paul, 382 U.S. 198 (1965); United States v. Jefferson County Board of Education, 372 F. 2d 836 (5th Cir. 1966); United States v. Montgomery Board of Education, 395 U.S. 225 (1969); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

41/ Geier v. University of Tennessee, 597 F. 2d 1056, 1081 (6th Cir. 1979).

as a white or black school. The Supreme Court has recognized that the racial identity of an institution influences voluntary choices that people make. 42/ It also affects whether students feel they are wanted, and whether the institution will be responsive to their needs. In Nashville, Tennessee, the court considered a traditionally white institution still segregated when the faculty remained 3% black. 43/ However, case law in higher education contains no firm rules about how much faculty desegregation is enough. Because individual institutions, rather than systems of higher education, hire and assign professors, total racial balance of faculty is not achievable nor necessarily desirable. Yet the courts insist that institutions provide inducements that work, in order to desegregate faculty. 44/

While the rulings of the courts are not derived from social science, they are supported by research. Studies indicate that desegregation requires changing power structures and attitudes within schools. Minority students at traditionally white institutions need persons of their own race in positions of authority in order to have equal status within institutions. 45/ Moreover, black students' achievement is spurred by black faculty, who provide role models. 46/

42/ In considering the elementary and secondary schools of Dayton, Ohio, the Supreme Court considered the relationship of racially identifiable schools to voluntary housing choices. The Court noted that segregated schools affect where people choose to live. 443 U.S. 526, note 13 (1979).

43/ Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977).

44/ Geier v. Dunn, 377 F. Supp. 573, 581 (M.D. Tenn. 1972).

45/ See the research on determinants of equal status in elementary and secondary education, e.g., Elizabeth Cohen, Design and Redesign of the Desegregated School, Palo Alto, Stanford University, 1980.

46/ Scott, W.B., "Critical Factors for the Survival of First Generation College Blacks," in Black Students at p.226; Geertsma, R.H., "A Special Tutorial for Minority Medical Students," in Black Students at p.272.

d. Research on elementary and secondary education confirms many common sense notions about how the social atmosphere of an institution influences whether another race is welcome. The atmosphere is hostile if a group is segregated within the schools, if some students are treated as outsiders, if their curricular and counseling needs are unmet, if extra-curricular activities seem exclusive, if members of one race are admitted but forced out later because support services are unavailable. Similarly, segregation of academic and extracurricular programs within a college in the form of tracking or separation of races into day-time and night-time programs, sends a message about who is welcome. Segregatory practices also create an institution that is clearly not "operating on a desegregated basis," as required by the Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education (the Criteria). 47/ Research on the desegregation of higher education indicates that many intangible factors contribute to making an institution a positive environment for minority students.48/ For example, the degree to which black students participate in integrated campus activities influences the likelihood that they will persist in their education. 49/

Like most aspects of desegregation, what constitutes "operating on a desegregated basis" has been examined by courts more at the elementary and secondary than the higher education level. In developing standards for effectively desegregating elementary and secondary education, the federal courts have consistently ruled against the use of ability grouping and tracking systems which result in segregation. One of the earlier cases to rule against segregative tracking was the Hobson v. Hansen case in Washington, D.C. 50/ Similarly, in reference to a plan proposed in Marshall County and Holly Springs, Mississippi, another court of

47/ 43 Fed. Reg. 6662, February 15, 1978.

48/ Scott, W.B., "Critical Factors for the Survival of First Generation College Blacks," in Black Students, p.226.

49/ Cross, P.H. and H.S. Astin, "Black Students in Black and White Institutions," in Black Students, p.88.

50/ 269 F. Supp. 401 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

appeals withheld judgment on the validity per se of a desegregation plan that assigned students on the basis of tests, saying, "testing cannot be employed in any event until unitary school systems have been established." 51/ The courts have ruled specifically that test scores, ostensibly neutral sorting devices, cannot be used when they prevent achieving a unitary system. In another case, this one arising in Plain Dealing, Louisiana, where a school district wished to assign children in grades 4-12 to one of two schools on the basis of scores on the California Achievement Test, the court thought it "obvious" that such a plan was not in compliance with orders to desegregate. The district had been unitary for only one semester, and the court noted that it requires several years at a minimum to achieve a truly unitary system. 52/ The court of appeals on another occasion looked beyond the composition of schools to individual classrooms, ruling that test results may not be used when the effect is segregated classrooms, even though the schools would be considered desegregated were one to examine only headcount statistics. Declining to rule on the validity of using tests per se for assignment to recently desegregated classrooms, the court of appeals has repeatedly ruled that standardized ability and achievement tests may not be used to perpetuate segregated classrooms within desegregated schools. 53/ Similarly, in McNeal v. Tate County School District 54/, a court barred a school district from assigning children to classrooms on the basis of intelligence tests, if the practice created racial segregation, until the district had operated without a tracking

51/ Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1219 (5th Cir. en banc 1969), rev'd in part on other grounds, sub nom. Carter v. West Feliciana Parish School Board, 396 U.S. 290 (1970).

52/ Lemon v. Bossier Parish School Board, 444 F. 2d 1400 (5th Cir. 1971). See also United States v. Sunflower County School District, 430 F. 2d 839 (5th Cir. 1970), cert. denied, 398 U.S. 951 (1970) and United States v. Tunica County School District, 421 F. 2d (5th Cir. 1970).

53/ Moses v. Washington Parish School Board, 456 F. 2d 1285 (5th Cir. 1972), cert. denied, 409 U.S. 1013 (1972).

54/ 508 F. 2d 1017, 1020 (5th Cir. 1975).

system long enough to assure that slower track students were not suffering from the effects of prior educational discrimination. So long as black students in the lower track had once attended segregated schools that would be the case.

More recently, a case challenged Florida's requirement that students pass a minimum competence test in order to receive a high school diploma. The court postponed the requirement for four years, that is, until students no longer suffered from vestiges of the dual system. The court of appeals ruled that the state must show that the test in fact covers material taught throughout the schools. The burden is on the state to show that the racially disparate effect of the test is not the current effect of past discrimination. 55/

The Criteria touch upon the application of these cases to higher education, referring to the "need to broaden definitions of potential; to discount the effects of early disadvantage on the development of academic competence; and to broaden the talents measured in admissions tests." 56/ Failure to do that merely perpetuates the effects of past discrimination.

The Federal court in Nashville 57/ recognized the impact of past unequal educational opportunity on college admission test scores, and stated that institutions could not sort students and limit opportunities based on those scores. 58/ Tests may

55/ Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), aff'd, 644 F. 2d 397 (5th Cir. 1981).

56/ 43 Fed. Reg. 6660 (February 15, 1978).

57/ Sanders v. Ellington, 288 F. Supp. 937 (M.D. Tenn. 1968).

58/ 288 F. Supp. at 940-41. Kendall implies that to raise admission standards uniformly, knowing the exclusionary effect, would be unconstitutional, especially where the state's earlier discrimination caused blacks to be denied entry to higher education.

be used to identify students with potential and to discover what remedial aid is needed, not to create a rigid inferior track. Thus remedial programs must not only be present at traditionally white institutions but they must work so that black students progress out of them into the mainstream. 59/ If testing results in racially segregated tracks for different programs, and the students who are taking those tests have spent part of their education in de jure segregated schools, the resultant tracking would be as illegal at the higher education level as the resultant denial of a diploma at the secondary level was illegal under the ruling in Debra P. v. Turlington. Similarly, the burden should be on the state system to prove that substantially disproportionate racial composition of programs is not a vestige of the dual system.

In monitoring the desegregation process in Nashville, Chief Judge Gray probed beyond headcount enrollment at the traditionally black institution and noted that whites were concentrated in two programs, off-campus centers and graduate education, and this was a sign that desegregation was not working. 60/ Even though some programs were desegregated, it was necessary to examine each campus and each academic program throughout the institution to determine whether desegregation measures were effective. 61/

e. Retention and completion. In Richardson v. Blanton the court of appeals ruled that traditionally white higher education institutions have an obligation beyond opening the door to admit black students. It ordered lower courts to scrutinize retention to determine whether

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59/ There is ample precedent in elementary and secondary education law to require a state to provide remedial services to make up for inferior education and other effects of segregation on minority students. See, e.g. Milliken v. Bradley, 433 U.S. 267 (1977), and the cases cited in footnotes 14-19, above.

60/ Geier v. Blanton, 427 F. Supp. 644 (M.D. Tenn. 1977).

61/ 427 F. Supp. at 656 and 659.

desegregation was in fact working. 62/ Moreover, the reasoning of Debra P. v. Turlington applies again to higher education. It is the state's burden to prove that lower retention and completion rates for black college students whose prior education took place in a de jure segregated educational system are not the outgrowth of prior discrimination just as were the disparate test scores of high school students examined by the Debra P. court.

Researchers have determined that retention of black students presents a greater problem than the admission of black students to undergraduate education. 63/ They have also described the characteristics of retention programs which work. 64/

The importance of college completion was also implicit in the court of appeals' ruling in Adams v. Richardson. The court stressed that the overriding importance of the desegregation of higher education was to spur the entry of more blacks to graduate and professional schools and thus into the learned professions. 65/ The underrepresentation of blacks in the professions is well documented. 66/

62/ 597 F. 2d 1078, 1084 (6th Cir. 1979). For a similar line of reasoning, see Comment, Integrating Higher Education: Defining the Scope of the Affirmative Duty to Integrate, 57 Iowa Law Review 898 (February 1972). The author argues at p.911 that programs for retention and special admissions are necessary because "the state is affirmatively remedying the injustice its previous actions perpetrated."

63/ Thomas, G.E., J.R. Mingle and J.M. McPartland, "Segregation and Degree Attainment in Higher Education," in Black Students, p.113. The authors also document the need for greater access to graduate and first-professional levels. (p.124) W.A. Allen reviews the literature and presents research findings on attrition and its relationship to social life and support services, in Black Students at pp.128-137.

64/ Young, H.A., "Retaining Blacks in Science," in Black Students at p.261; Bromery, R.W., "An Example of Student Retention for Minority Engineering Programs," in Black Students at p.253.

65/ 480 F. 2d 1159, 1164-65 (D.D.C. 1973).

66/ See, e.g., Blackwell, J.E., "The Access of Black Students to Medical and Law Schools," in Black Students, p.189, and works cited by him.

f. Channeling of black students to community colleges and black colleges. The 1960s and '70s were notable for two phenomena in higher education, the rapid expansion of enrollment and facilities in general, and the burgeoning of community colleges in particular. 67/ Both phenomena held out promise for increasing educational opportunities for black students which was only partially realized in practice.

As the demand for places in senior college swelled, many states built branches of traditionally white institutions near traditionally black institutions. Predictably the branches attracted white students who might otherwise have attended their traditionally black neighbors. The courts have ruled that the expansion and construction of white institutions in proximity to traditionally black institutions is illegal when it has the effect of impeding desegregation. 68/ In Geier an extension center of the University of Tennessee was opened in Nashville, close to the traditionally black college, Tennessee A&I (later known as Tennessee State University). Black students sued to close the center because it would prevent the desegregation of Tennessee State by providing an alternative for white students. The state refused, arguing that the extension center would offer non-degree programs at night and would not cater to the same students as Tennessee A&I. While the state opened the UT-Nashville offering non-degree night programs, degree programs were later offered which duplicated those at A&I. When the court found that the University of Tennessee-Nashville in fact functioned as a barrier to desegregation, it ordered the Nashville center to be merged into the traditionally black institution.

67/ For data on enrollment trends, see G.E. Thomas, Race and Sex Group Equity in Higher Education: Institutional and Major Field Enrollment Statuses, 17 American Educational Review Journal 171 (June 1980), and Thomas, G.E., J.M. McPartland and D.C. Gottfredson, "Desegregation and Black Student Access," in Black Students at p.336.

68/ Geier v. University of Tennessee, 597 F. 2d 1056 (6th Cir. 1979), cert. denied. 444 U.S. 886 (1979), Norris v. State Council of Higher Education for Virginia, 327 F. Supp. 1368 (E.D. Va. 1971), aff'd sub nom Bd. of Visitors of the College of William and Mary in Virginia, 404 U.S. 907 (1971).

In the Norris case, the court ruled that Richard Bland, a two-year branch of the traditionally white College of William & Mary, might not be expanded into a four-year college. The two-year institution had been in existence for ten years as a white college, located near the traditionally black institution, Virginia State. The court reasoned that the expansion of the two-year college into a four-year institution would prevent the desegregation of Virginia State.

The earlier ASTA case 69/ stands for a contrary ruling. On the basis of facts known in Montgomery, Alabama at the time of trial, the court said it was purely speculative that the effect of the establishment of Auburn-Montgomery, near the traditionally black Alabama State, would impede desegregation of higher education. In a case of first impression, the court did not believe there was any affirmative duty to desegregate beyond adherence to an open admission policy.

Several years of experience, watching the desegregation process in higher education, led the courts of the Fourth and Sixth Circuits to reject this position in the Norris and Geier cases. On similar facts, the Sixth Circuit turned aside the reasoning in ASTA and enjoined Tennessee from opening a community college in predominantly white Shelby County. The community college (like Auburn-Montgomery), was not in existence at the time of trial, but the court did not consider its future racial composition speculative, nor did it doubt that the effect would be to impede desegregation. 70/

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69/ Alabama State Teachers Association v. Alabama Public School and College Authority, 289 F. Supp. 784 (M.D. Ala. 1968), aff'd, 393 U.S. 400 (1969).

70/ Geier v. Blanton, 427 F. Supp. 644, note 8 at 648 (M.D. Tenn. 1977).

Many observers have questioned the extent to which community colleges have in fact contributed to the equitable expansion of opportunity. They observe a disproportionate number of students from minority groups enrolled in terminal, rather than degree programs 71/ and a disproportionate number of black students not attaining the degree or transfer goal they had set for themselves. 72/ Clearly not everyone belongs in a four-year college. Community colleges perform an essential job by offering to many students opportunities to acquire occupational skills, as well as providing opportunities for transfer to senior colleges. A legal issue arises if black students are disproportionately counseled to attend community colleges and then channeled into ineffective remedial courses and terminal programs, rather than courses and programs that provide transfer credit at senior colleges. Articulation policies and practices -- the extent to which degree program requirements and course credits are compatible -- between two-year colleges and four-year traditionally white and traditionally black institutions can also function in ways that impede the desegregation of higher education systems.73/

Title VI requires the elimination of all impediments to dismantling dual systems, including barriers to equal opportunity by means of channeling black students to community colleges and traditionally black institutions.

71/ Astin A., Four Critical Years, San Francisco, Jossey - Bass (1977); Stuart, R., Black Perspectives on State Controlled Higher Education: the Florida Report, N.Y., John Hay Whitney Foundation, 1975.

72/ Tschechtelin, J.D, "Black and White Students in Maryland Community Colleges," in Black Students, pp.156-58.

73/ Mohr, P.B., Sr., and J.C. Sears,"A Successful Model for Articulation and the Development of a Two-Plus-Two Program at a Predominantly Black and a Predominantly White Institution," in Black Students, p.306. Although this article provides a favorable description of the Norfolk State - Tidewater Community College two-plus-two program, white undergraduate enrollment at Norfolk State University remains under 6%, according to U.S. Dept. of Education, Office for Civil Rights 1980 statistics, NCES 2300-2.3A.

III. How much desegregation is required of black colleges?

Derrick Bell has expressed his concern that desegregation often works in ways that decrease opportunity for black students and black institutions. 74/ He argues that the education offered at separate black colleges can be equal to that offered at traditionally white institutions. The difficulty is in selecting remedies to strengthen black institutions and increase opportunities for black students without condoning separate-but-equal as a public policy. The theory underlying Brown, that separate was inherently unequal, was that societally-imposed segregation created a stigma of inequality. Brown did not say that an all-black school cannot be a good school, only that state-imposed segregation cannot be equal. However, one can argue that separate education cannot provide equal status until American attitudes about race change.

William Trueheart's history of land-grant institutions 75/ demonstrates that Federal and state policies have deprived traditionally black land-grant institutions of funds for academic programs, research, and extension services, and this has given the colleges an inferior status. Because of underfunding and because of social attitudes, black institutions have been stigmatized as inferior. However, a college that is predominantly black as a result of entirely free choice of students, that is adequately funded so that all the effects of past discriminatory policies are removed, might be legal.

74/ Black colleges and the desegregation dilemma, 28 Emory Law Journal 899 (Fall 1979).

75/ The Consequences of Federal and State Resource Allocations on Development Policies for Traditionally Black Land-Grant Institutions, 1862-1954. Harvard Graduate School of Education dissertation, 1979.

Title VI requires nondiscrimination by all public institutions of higher education, including black colleges. 76/ It can be argued that integration is a desirable social policy because it prepares white and black students to work together in the world after graduation, 77/ and because it provides networks of opportunity for jobs. 78/ Nevertheless, the law does not compel only one option, offering education only in an integrated, white-dominated institution.

As discussed above, nondiscrimination means that a college provides a social milieu in which other-race persons are welcome. It requires a state to take all actions necessary to ensure that choices are genuinely free, so that persons who wish to attend an equitably-funded, predominantly black institution may do so, and persons who wish to attend a desegregated traditionally white institution may do so, assured that all necessary services are available and the social milieu is not exclusionary. 79/ Desegregation does not require homogenizing higher education. Diversity has been a strength of American higher education. Choice among culturally and academically diverse institutions is desirable, so long as the choices are free and so long as comparable racially distinguishable institutions have equal resources. 80/ Likewise, a black college cannot legally be abolished without

76/ Craig v. Alabama State University, 451 F. Supp. 1207 (M.D. Ala. 1978), aff'd, 614 F. 2d 1295 (5th Cir. 1980).

77/ See Kendall at 683.

78/ Pettigrew, in his report to the judge in Los Angeles, supra, and Linda Gottfredson, in "Analytical Description of Employment According to Race, Sex, Prestige and Holland type of work," 13 Journal of Vocational Behavior 210 (1978), have pointed out that minority youth have been excluded from the channels that lead to good jobs, and that desegregation may be opening those channels.

79/ For a similar line of arguement, see Note, Integration of Higher Education in the South, 69 Columbia Law Review 112 (January 1969), in which the author compared district court decisions in Sanders v. Ellington and ASTA.

80/ See Kendall.

making full provision for its students and similar students who might not be welcomed, for whatever reason, at other colleges. 81/ In Judge Pratt's words, "the process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education." 82/ His ruling in Adams leaves considerable uncertainty. Is the court saying that the process of desegregation must not place a greater burden on black institutions than on white institutions, and on black students than on white students? Or is it saying the process must not place on black institutions and black students a burden greater than was on them prior to desegregation? Unclear, too, is how to weigh the burden or to compare a (perhaps slightly) decreased burden on black students with a (perhaps greatly) increased burden on black institutions, e.g., their destruction.

IV. Conclusion on the burden of proof and the degree of desegregation.

In the case of elementary and secondary education the burden is on a school district to show that any remaining segregation is not the result of past discriminatory practices. The burden arises from the district's authority to assign students and staff and from the district's affirmative duty to desegregate. In the case of higher education, attendance is voluntary and the central authorities do not assign students and hire faculty, and to some degree this must alter the burden and the means available to remedy illegal segregation. Nevertheless, the state continues to have the affirmative duty to develop a desegregation plan that works.

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81/ Kendall at 686.

82/ Adams v. Califano, 430 F. Supp. 118, 120 (D.D.C. 1977).

Assuming that desegregation does not require a particular racial composition (either that each institution be less than half minority or that each institution reflect the racial proportions of the statewide applicant pool or the service area), the state's duty is to ensure that choices are genuinely free. Because vestiges of a dual system have created impediments to free choice, it follows that insofar as the distribution of students among institutions of higher education deviates from the proportion of the racial groups in the system as a whole, the burden remains on the state to demonstrate that the disproportion arises from free choice, rather than from institutional barriers. In this context, it becomes clear that the court in Geier used statistics on racial balance not unlike the Supreme Court's use of racial balance statistics in Swann. The figures raise a presumption that substantial racial disproportion is a vestige of the former dual system. The state must demonstrate that choices are not forced by remaining vestiges of the dual system.

It has been suggested that proponents of affirmative desegregation rest their theory on naive idealism that, absent state action by school authorities, schools and colleges would be racially balanced, while opponents of desegregation base their theory on the more sophisticated and realistic belief that even absent discriminatory acts by school authorities, private choices would segregate. 83/ This paper has tried to indicate that public actions, private decisions and institutional behavior reenforce one another. (Governmental decisions, after all, reflect the society's current racial attitudes constrained only by the society's fundamental values embodied in the Constitution.) Civil rights advocates do not base their arguments on naive idealism that "in a governmentally neutral world people would voluntarily desegregate," 84/ but on the understanding

83/ See, e.g., James F. Blumstein, Legal Issues in the Desegregation of Postsecondary Education, Educational Policy Development Center for Desegregation, Center for Education and Human Development Policy, Institute for Public Policy Studies, Vanderbilt University, June 1981.

84/ Blumstein, page 12.

that governmental discrimination in many areas (e.g., schools, housing, employment, urban renewal, zoning, revenue sharing, taxation) has influenced and bolstered behavior of private individuals and institutions (e.g., real estate racial steering, exclusionary zoning practices, biased career counseling). Thus one would hardly expect that the adoption of neutral admissions policies would effect remarkable changes in the racial composition of institutions of higher education. The state government's burden to make sure that desegregation in fact works -- to make sure that all necessary institutional changes occur -- rests on a highly sophisticated understanding of social behavior. A student's decision where to go to college is influenced by the structure and behavior of institutions of higher education, which in turn are influenced by governmental acts which created the dual system. Private decisions, institutional behavior and governmental acts are entwined in ways that we do not fully understand, but which nonetheless require our attention.